IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

THURSDAY, THE 11TH OCTOBER 2007 / 19TH ASWINA 1929

SA.No. 870 of 1994()

AS.31/1992 of SUB COURT, MUVATTUPUZHA
OS.283/1987 of MUNSIFF COURT,MUVATTUPUZHA
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APPELLANT: RESPONDENTS/ DEFENDANTS
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1. **STATE OF KERALA REP.BY THE CHIEF SECRETARY, TO GOVERNMENT, SECRETARIAT, THIRUVANANTHAPURAM.**

2. **DISTRICT COLLECTOR, ERNAKULAM.**

3. **TAHSILDAR, MEENACHIL TALUK, PALAI.**

4. **THE SECRETARY, BOARD OF REVENUE, (EXCISE), TRIVANDRUM.**

5. **THE ASSISTANT EXCISE COMMISSIONER, ERNAKULAM.**

6. **THE EXCISE INSPECTOR, PIRAVOM, MUVATTUPUZHA.**

BY GOVERNMENT PLEADER

RESPONDENT/ APPELLANT/ PLAINTIFF

JOSE G.MATHEW, S/O. JOSEPH, KUREETHADATHIL, ELANJI VILLAGE, MUVATTUPUZHA TALUK.

BY

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 11/10/2007 , THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

SA. NO.870/1994

ORDER ON CMP. NO.1920/1994 IN SA. NO.870/1994

DISMISSED

11.10.2007 **SD/- M.SASIDHARAN NAMBIAR, JUDGE**

/TRUE COPY/

P.A. TO JUDGE

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M.SASIDHARAN NAMBIAR, J.

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S.A.No. 870 OF 1994

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DATED THIS THE 11th DAY OF OCTOBER, 2007

JUDGMENT

Defendants in O.S.283 of 1987 before Munsiff Court, Muvattupuzha are the appellants. Plaintiff is the respondent. Respondent was the successful auction purchaser to run arrack shops in Group No.2 of Piravom Excise Range for the period 1987-88. Ext.B1 agreement was executed incorporating the terms. Under the agreement, respondent is granted the privilege to run arrack shops A.S.4 of Ramamangalam, A.S.6 of Ooramana, A.S.7 of Piravom and A.S.No.8 of Ezhakkaranad. The rental for each of the shop respectively are Rs.10,44,000/-, Rs.9,94,600/-, Rs.11,68,801/- and Rs.9,94,600/-. Appellants instituted the suit seeking a decree for declaration that appellants are not entitled to initiate proceedings under Revenue Recovery Act for realisation of the kist amount due in respect of A.S.No.6 at Ooramana for the period 1987-88 and also for a declaration that for non-payment of the said kist amount, appellants are not entitled to cancel the licence to run arrack shop Nos. 7 and 8 and also for a permanent prohibitory injunction restraining appellants from initiating steps under Revenue Recovery Act for

realisation of the kist amount in respect of A.S.No.6 at Ooramana for the year 1987-88. Case of respondent was that he was also the successful bidder during the previous year 1986-87 and he had the privilege to run shop Nos. 4 at Ramamangalam and Madyanirodhana samithi organised agitation before that shop and in spite of attempt to get police aid from this court by filing writ petition, respondent did not succeed in getting police aid and finally could not run the shop. At the time of auction in the year 1987-88, Collector declared that for the period 1987-88 necessary protection would be given and believing that respondent participated in the auction and obtained the privilege to run the shops. It was contended that to the shock of respondent from the very beginning Sarvodaya people started agitation against running of shop No.6 at Ooramana and even though appellants are bound to give protection, it was not granted and therefore respondent could not run the shop and hence he is not liable to pay the kist amount. It was contended that without quantifying the loss suffered by respondent, revenue recovery proceedings cannot be initiated and respondent is entitled to a decree for declaration as sought for.

2. Appellants in the written statement admitted that respondent was the successful auction purchaser who executed Ext.B1 agreement. But it was contended that during the period 1986-87, there was agitation against running of shop No.A.S.4 and High Court did not grant protection to the auction purchaser to run the shop and knowing that respondent participated in the auction and bid the same and therefore respondent is not entitled to contend that because of the agitation he is not liable to pay the kist amount. It was contended that the monthly quota for shop No.6 of Ooramana was received by appellant for the month of April and May 1987 and in such circumstances respondent is not entitled to the decree prayed for. It was also contended that respondent is not entitled to the decree for declaration as the licence provide for realisation of kist amount by revenue recovery proceedings and the agitation was only against running of the shop at that particular place and respondent could have shifted the shop to some other place and therefore he is not entitled to the decree sought for.

3. No oral evidence was adduced by the parties. Exts.A1 to A10 on the side of respondent and Ext.B1 on the side of

appellants were marked. Learned Munsiff on the evidence dismissed the suit holding that under Ext.B1 agreement and Ext.A1 licence, for the balance kist amount due, appellants are entitled to proceed under Revenue Recovery Act and even though there was agitation as against particular shop A.S.6 of Ooramana, respondent could have shifted the shop to some other unobjectionable part and in such circumstances he is not entitled to the decree sought for. Respondent challenged the decree and judgment before Sub Court, Muvattupuzha in A.S.31 of 1992. Learned Sub Judge, on reappreciation of evidence, found that the fact that there was agitation against running of shop A.S.No.6 at Ooramana from the very beginning of the contract period was not disputed and even though respondent approached the High Court for protection, it was not granted and therefore respondent could not run the shop and as a result, he is not liable to pay the kist amount. Learned Sub Judge held that without quantifying the damage sustained by the non-running of the shop, appellants are not entitled to proceed under the Revenue Recovery Act for realisation of the kist amount and granted a decree declaring that appellants have no power to

initiate revenue recovery proceedings against respondent for realisation of the kist amount in respect of A.S.6 of Ooramana for the period 1987-88 before adjudicating and deciding and quantifying the liability. A decree for injunction restraining appellants from initiating revenue recovery proceedings without quantifying the same was granted. It is challenged in the second appeal.

4. The second appeal was admitted formulating the following substantial questions of law.

1) Whether plaintiff is entitled to a decree for declaration of injunction against revenue recovery proceedings in view of Ext.B1 agreement and the express provision contained in the Kerala Abkari Act and Rules.

2)Whether respondent is entitled to avoid payment of kist amount when he could have shifted the shop to an unobjectionable site within the notified area, when running of shop No.A.S.6 of Ooramana was objected to by agitation.

5. Though notice was served on respondent, he did not appear. Learned Government Pleader was heard.

6. Ext.A1 is the license incorporationg the terms and

conditions provided for running of shops. Ext.B1 is the agreement executed by respondent on 28.4.1987. Under Ext.B1 respondent has the right to run shop Nos.4, 6, 7 and 8 for the year 1987-88. All these shops are of Piravom range. The fact that there was agitation against running of shop No.A.S.6 of Ooramana from the very beginning of the contract period was not disputed. The written statement itself shows that O.P.4884 of 1987 was filed by Madyanirodhana Samithi for a direction to close down shop No.A.S.6 of Ooramana. It was also admitted in the written statement that subsequently High Court has allowed the O.P and directed appellants not to permit functioning of shop No.6 at Ooramana. It is the case of respondent that because of the agitation and non-providing sufficient protection, shop No.A.S.6 could not be run and therefore he is not liable to pay the kist amount. The specific case in the written statement was that respondent obtained the monthly quota for shop No.A.S.6 at Ooramana during the license period for the months of April and May 1987. This fact was not denied by respondent. In fact respondent did not mount the box or even attemt to prove that the monthly quota of Shop NO.6 was not released. In such

circumstances it cannot be said that respondent did not enjoy the privilege of running shop No.A.S.6 at Ooramana.

7. As Ext. B1 ageeement specifically provides that State is competent to realise the amount due under Ext.B1 agreement, by resorting to revenue recovery proceedings, the Abkari Act and Rules framed thereunder also enable the State to realise the kist amount due by resorting to revenue recovery proceedings. Therefore respondent cannot contend that appellants are not liable to proceed under the Revenue Recovery Act. The finding of first appellate court is that without quantifying the actual liability of respondent, as the respondent could not run the shop, revenue recovery proceedings cannot be initiated. As rightly pointed out by learned Government Pleader, condition No.2 of Ext.A1 license specifically provide that though the auction purchaser is not entitled to shift the shop from the site notified, with the permission of Revenue Board or the Assistant Excise Commissioner, the shop could be shifted to any other place within the boundaries of that shop. Therefore even if there was agitation against conducting shop No..A.S.6 at Ooramana, and in the writ petition filed by Madyanirodana Samithi appellants were

restrained from granting permission to run a shop at Ooramana, respondent could have shifted the shop to any other unobjectionable site within the boundaries of that shop and conducted the shop. It is more so because respondent was not a stranger. It is admitted in the plaint itself that during the previous year he was the successful bidder of shop No.4 and due to the agitation of Sarvodaya leaders, he could not run the shop and though he approached this court for protection, this court did not afford him protection and the writ petition filed by Madyanirodana Samithi was allowed for the reason that they are only conducting peaceful agitation. In such circumstances it is clear that respondent was aware of the objection and possibility of non-running of the shop at the particular place when he attended the auction. With open eyes he participated in the auction and bid the right to run the four shops as is clear from Ext.B1. When Ext.B1 provides that the shop could be shifted with the previous permission of the Board of Revenue, or the Assistant Excise Commissioner within its boundaries, respondent could have sought sanction for shifting the shop. There is no case that respondent sought permisssion to shift the shop and

that such permission was not granted. In such circumstances, respondent is not entitled to a decree for declaration that he is not liable to pay the kist amount due under Ext.B1. Decree granted by first appellate court is therefore not sustainable.

Appeal is allowed. Decree and judgement passed by Sub Court, Muvattupuzha in A.S.31 of 1992 are set aside. O.S.283 of 1987 on the file of Munsiff Court, Muvattupuzha stands dismissed. No cost.

M.SASIDHARAN NAMBIAR, JUDGE

lgk/-